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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35799

RAPID CITY, PIERRE & EASTERN RAILROAD, INC.—ACQUISITION AND OPERATION EXEMPTION—DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

Docket No. FD 35800

GENESEE & WYOMING INC.—CONTINUANCE IN CONTROL EXEMPTION—RAPID CITY, PIERRE & EASTERN RAILROAD, INC.

Digest:[1] In April 2014, the Board authorized the acquisition and operation of approximately 670 miles of rail lines by Rapid City, Pierre & Eastern Railroad (RCP&E), a newly-created non-carrier subsidiary of Genesee & Wyoming Inc. (GWI), and allowed GWI to continue in control of RCP&E once it consummated the transaction and became a rail carrier. Five labor unions petitioned the Board to treat the transaction as if it had involved only the exercise of Board authority over GWI, an action that would trigger labor protection for employees affected by the acquisition. The Board, citing longstanding precedent and practice, denies the petitions.

Decided: May 12, 2015

BACKGROUND

In April 2014, in Docket No. FD 35799, the Board authorized, through the exemption process, the acquisition by the Rapid City, Pierre & Eastern Railroad (RCP&E), a non-carrier, of approximately 670 miles of rail lines of the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) in South Dakota, Wyoming, Minnesota, and Nebraska.[2] In Docket No. FD 35800, also

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] In Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081 (STB served Sept. 30, 2008), the Board authorized Canadian Pacific Railway Company (CP), a Class I rail carrier, to acquire indirect control of DM&E and DM&E's wholly owned rail subsidiary, Iowa, Chicago & Eastern Railroad Corporation. For convenience, this decision generally refers to DM&E.

through the exemption process, the Board permitted Genesee & Wyoming Inc. (GWI), RCP&E's corporate parent, to continue in control of its subsidiary after RCP&E received a license as a rail carrier.

Petitioners, which are five labor unions, filed for revocation challenging the use of the Board's two-step process. Although § 10901 specifically authorizes non-carriers to acquire rail lines without being subject to labor protection conditions,[3] Petitioners' objective is to have the Board impose on the acquisition the labor protection provisions that apply to transactions involving two or more rail carriers decided under 49 U.S.C. §§ 11323 – 11325.

RCP&E and GWI oppose the petitions for revocation. They argue that Petitioners have not met the standards for revocation, that RCP&E and GWI properly invoked the two-step exemption process and complied with all pertinent statutory and regulatory requirements, and that Petitioners have failed to show that the holding company/corporate structure of RCP&E and GWI is a sham or an improper "alter ego" corporate structure.

The Exemptions. On January 2, 2014, RCP&E and DM&E announced that they had entered into an agreement under which RCP&E would purchase approximately 670 miles of DM&E lines and operating rights west of Tracy, Minn. (DM&E West Lines).[4] DM&E would remain a Class II carrier and would continue to own and operate approximately 1,900 miles of rail line.

In lieu of filing a formal application under § 10901 for a license to acquire and operate the DM&E West Lines, RCP&E invoked the Board's class exemption at 49 C.F.R. § 1150.31 by filing a notice of exemption on March 11, 2014, in Docket No. FD 35799. Concurrently, in Docket No. FD 35800, RCP&E's parent (GWI) sought authorization to continue in control of RCP&E, together with the other railroads in its corporate family,[5] once RCP&E became a rail carrier. To obtain this authorization, it requested an exemption from § 11323 by invoking the class exemption at 49 C.F.R. § 1180.2(d)(2).

[3] The statute had given our predecessor, the Interstate Commerce Commission (ICC), discretionary authority to impose labor protection on these sorts of § 10901 transactions, but the ICC typically declined to do so. In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), enacted on December 29, 1995, and effective on January 1, 1996, Congress amended the section by removing the agency's discretion to authorize labor protection. See § 10901(c).

[4] The DM&E West Lines are also the subject of an ongoing enforcement proceeding. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081 (Sub-No. 2) (STB served Dec. 20, 2013). The issues raised in that proceeding will be addressed in that docket.

[5] In its notice of exemption GWI explains that it currently controls, directly or indirectly, one Class II carrier and 100 Class III carriers operating in the United States. GWI is not itself a rail carrier.

The Board published RCP&E's and GWI's respective notices of exemption on March 27, 2014.[6] In response, the Board received numerous comments and letters from elected officials, government agencies, economic development groups, and shippers supporting the exemptions.[7] Pursuant to the notice in Docket No. FD 35799, the acquisition and operation exemption became effective on April 25, 2014.[8]

Revocation Requests. On April 18, 2014, the Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, and International Association of Sheet Metal, Air, Rail and Transportation Workers/Mechanical Division (Unions) jointly filed a petition seeking revocation of the exemption granted in Docket No. FD 35799. They claim that, although RCP&E filed the notice of exemption in Docket No. FD 35799, GWI is, in fact, the real party in interest here because (1) GWI will be providing startup capital and guaranteeing RCP&E's obligations; (2) GWI and RCP&E share some officers; (3) RCP&E and GWI's other railroads share similarly stylized logos; (4) one of GWI's subsidiaries will provide certain administrative and corporate services to RCP&E; and (5) GWI has described itself elsewhere as an integrated group of rail carriers and has stated that it is acquiring the DM&E West Lines. The Unions assert that the relationship between GWI and RCP&E, the relationships among the GWI railroads, and the involvement of GWI in the operation and management of the GWI subsidiaries demonstrate that the RCP&E transaction is really the acquisition of DM&E lines by a group of rail carriers and their holding company parent that should have been filed under § 11323, not § 10901. As noted, a proceeding under § 11323 entails labor protection, while one under § 10901 does not.

The Unions acknowledge that the ICC and several reviewing courts consistently permitted the two-step exemption process to help preserve service on lines that are either eligible for abandonment or marginally profitable and to help local companies acquire and operate endangered lines by not requiring labor protective conditions to be imposed on already fragile

[6] See Rapid City, Pierre & E. R.R.—Acquis. & Operation Exemption Including Interchange Commitment—Dakota, Minn. & E. R.R., FD 35799 (STB served Mar. 27, 2014); Genesee & Wyo.—Continuance in Control Exemption—Rapid City, Pierre & E. R.R., FD 35800 (STB served Mar. 27, 2014).

[7] Filers were U.S. Senator Tim Johnson, U.S. Senator John Thune, and U.S. Representative Kristi Noem of South Dakota; South Dakota Governor Dennis Daugaard; South Dakota State Senators Michael Vehle, Timothy Rave, Billie H. Sutton and Corey Brown; South Dakota State Representatives Brian Gosch, David Lust, Justin R. Cronin, Mark Mickelson, and Fred W. Romkema; Mayor Sam Kooiker of Rapid City, S.D.; Rapid City Chamber of Commerce, Greater Rapid City Area Economic Development Corp., City of Belle Fourche, S.D., Bentonite Performance Minerals, LLC (Bentonite), and West River Rail Association (WRRA).

[8] The exemption in the continuance in control proceeding became effective on April 10, 2014, but GWI stated in its March 11 filing that it did not intend to consummate that authority until after the authority in Docket No. FD 35799 became effective. On June 2, 2014, RCP&E submitted a letter indicating that it had consummated the acquisition, effective May 31, 2014.

transactions.[9] The Unions assert, however, that the policy determinations that drove decisions applying § 10901 to acquisitions of rail lines in the 1980s are no longer applicable, either generally or in this particular case. The Unions argue that the lines involved here are not eligible for abandonment or marginal and that there was no danger of loss of rail service if GWI had not bought them. They note that GWI is a multi-national corporation and that GWI's corporate family of railroads has combined annual revenues well above the threshold for Class I railroad status. Therefore, the Unions assert, there is no valid policy reason for GWI to receive the same treatment as small companies that acquired lines under § 10901 in the past. Additionally, the Unions claim that proper application of the Interstate Commerce Act requires the analysis of the true nature and actual effects of a transaction and that the need for regulation and labor protection should not be determined by the use of corporate devices such as the creation of a holding company or a subsidiary. The Unions ask that the Board revoke the exemption, handle any future effort by GWI or a GWI entity to acquire and operate the DM&E West Lines under § 11323, and impose the employee protection provided under § 11326.[10] The Unions also request an oral argument.

The International Association of Machinists and Aerospace Workers District Lodge 19 (IAM) and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers ("SMART")[11] make similar arguments seeking revocation of the exemptions and join in the Unions' request for an oral argument.[12] With respect to the RCP&E exemption, IAM contends that this was not a bona fide § 10901 transaction – and that the entire matter should have been adjudicated under § 11323 – because DM&E required GWI to stand in the shoes of RCP&E to provide specific performance of many on-going obligations between the parties under the Transaction Agreement. Alternatively, IAM suggests that the Board could adopt an interpretation of § 11326 that recognizes employees of both the seller and the buyer as "affected employees" entitled to labor protection under that provision in connection with GWI's control proceeding. SMART also suggests that the Board could undo these transactions by finding that GWI is RCP&E's alter ego or that GWI created RCP&E solely to avoid labor protection.

The Replies. On May 7, 2014, RCP&E replied to the petitions to revoke. RCP&E argues that the Petitioners have not met the standards of 49 U.S.C. § 10502(d) for revocation and that it complied fully with the Board's statutory and regulatory requirements in these cases.

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[9] See Unions Petition 2-3 (April 18, 2014) and cases cited therein

[10] See New York Dock Ry.—Control—Brooklyn E. Dist. Terminal, 360 I.C.C. 60 (1979), as modified by Wilmington Terminal R.R.—Purchase & Lease—CSX Transp., Inc., 6 I.C.C. 2d 799 (1990).

[11] The Sheet Metal Workers International Association and United Transportation Union merged to become SMART.

[12] The Unions, IAM, and SMART are collectively referred to as Petitioners in this decision.

With respect to the parties' decision to invoke the § 10901 class exemption for RCP&E's acquisition of the DM&E West lines and the § 11323 class exemption for GWI's retained control over RCP&E, RCP&E explains that both the two-step process and the policy of not imposing labor protection on non-carrier acquisitions under § 10901 are supported by longstanding agency and court precedent. RCP&E states that Congress codified that precedent when it amended § 10901 in the ICC Termination Act of 1995 (ICCTA) to add § 10901(a)(4) (expressly authorizing the § 10901 process to be used for non-carrier acquisitions) and § 10901(c) (precluding labor protection conditions in § 10901 transactions).[13] RCP&E further explains that it is a bona fide, independent company, that the acquisition transaction was implemented for sound business reasons, that it is permissible for a parent corporation to provide start-up capital and financial guarantees for a subsidiary, and that use of the two-step process here was not a sham under which RCP&E served as the alter ego of GWI to evade labor protection. Lastly, RCP&E explains that it has taken steps to mitigate harm to labor here, including offering positions to 162 of the 184 DM&E employees who applied, holding town hall meetings, and offering retraining to minimize the number of employees affected.

GWI filed a separate reply, on May 7, 2014, opposing revocation and generally adopting the arguments of RCP&E. Additionally, it opposes IAM's argument that the labor protective conditions imposed in the control proceeding should be extended to the employees affected by the acquisition proceeding.

PRELIMINARY MATTERS

On May 23, 2014, the Unions filed a request for leave to file a reply (accompanied by the reply) to RCP&E's reply, which the other petitioners joined. RCP&E objected. In the interest of providing a more complete record, we will accept and consider all of Petitioners' replies. Because the record is sufficient for the Board to adjudicate this matter, we will deny Petitioners' requests for an oral argument.

DISCUSSION AND CONCLUSIONS

Because Petitioners seek the treatment of the acquisition under § 11323 through revocation of the exemptions, our discussion will begin by focusing on the revocation criteria. Under § 10502(d), an exemption may be revoked, in whole or in part, when application of the Board's regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 (RTP). The burden of proof is on the Petitioners, who must articulate reasonable, specific concerns to demonstrate that greater Board scrutiny (here, looking to different statutory provisions) is necessary to carry out the RTP. Kaw River R.R—Acquis. & Operation Exemption—The Kan. City S. Ry., FD 34409 (STB served May 3, 2005); Portland & W. R.R.—Lease & Operation Exemption—Lines of Burlington N. R.R., FD 32766 (STB served Oct. 15, 1997). Labor interests have standing to question the appropriate level of labor protection in a

[13] Prior to ICCTA, labor protection in § 10901 cases was discretionary. Section 10901(e) (1995).

petition to revoke. See 49 U.S.C. § 10502(g); Iowa, Chicago & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link (IC&E Revocation), 6 S.T.B. 499, 502 (2003).

Petitioners argue that revocation is warranted, and that the transaction needs to be reviewed under different procedures, because RCP&E and the GWI family are one and the same and the policies underlying the agency's use of the two-step process in approving line acquisitions by non-carrier subsidiaries are outdated or not applicable here. As discussed below, however, the record demonstrates that the transfer of these lines through the agency's class exemption from 49 U.S.C. § 10901 as part of the two-step process was both lawful and well within the intended use of that class exemption. The record further demonstrates that, based on the Board's alter ego test, RCP&E is an independent entity from GWI and its family and that the acquisition transaction is not a sham. Therefore, there is no need to reexamine the process used by RCP&E and GWI. Petitioners' requests for revocation will be denied.

Appropriateness of Exemptions. The two-step process is a lawful means for a non-carrier entity like RCP&E to acquire part of an existing carrier's railroad lines pursuant to § 10901 while the parent holding company (here GWI) continues in control of its subsidiary under authority granted under § 11323. When Congress enacted ICCTA in 1995, it specifically provided that non-carriers can obtain authority to acquire railroad lines under § 10901, and that when they do so the agency cannot assign the labor protection obligations of the carrier that previously operated the lines. 49 U.S.C. § 10901(c). Doing away with the two-step process would effectively undercut the statutory changes that Congress made. The two-step process has also been affirmed by the courts. See, e.g., Ry. Labor Executives' Ass'n v. ICC, 914 F.2d 276, 280 (D.C. Cir. 1990); Bhd. of R.R. Signalmen v. ICC (Signalmen), 63 F.3d 638 (7th Cir. 1995).

Here, RCP&E sought approval for the § 10901 acquisition part of the two-step process by using our streamlined class exemption process codified at § 1150.31, which Petitioners also challenge. However, the class exemption process has also been affirmed on judicial review and continues to be frequently used. As the Board noted in SF&L Railway—Acquisition & Operation Exemption—Toledo, Peoria & Western Railway Between La Harpe & Peoria, Ill., 6 S.T.B. 408, 418 (2002), the ICC adopted the class exemption for the acquisition and operation of rail lines by non-carriers because the consideration of individual petitions for exemption from § 10901 had become a "burdensome and unnecessary expenditure of resources" on the agency and the individual petitioners. Class Exemption—Acquis. & Operation of Rail Lines Under 49 U.S.C. 10901 (Class Exemption), 1 I.C.C.2d 810, 811 (1985), aff'd sub nom. Ill. Commerce Comm'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987).

Contrary to Petitioners' claims, the Class Exemption is not limited to lines in imminent danger of abandonment. As the ICC stated in New England Central R.R.—Acquisition & Operation Exemption—Lines Between East Alburg, Vt. and New London, Conn. (New England Central), FD 32432, slip op. 21, quoting Class Exemption, 1 I.C.C. 2d at 813, "Transfer of a line to a new carrier that can operate the line more economically or more effectively than the existing carrier serves shipper and community interests by continuing rail service, and allows the selling railroad to eliminate lines it cannot operate economically. Transfer before a financial crisis (with attendant plans for abandonment) helps ensure continued viable service."

Petitioners suggest that the RCP&E acquisition did not qualify for the Class Exemption because it would result in the creation of a Class II carrier. But in 1988, the ICC retained the Class Exemption for transactions involving the creation of a Class I or Class II carrier, with additional data and notice requirements with which RCP&E complied in this case. Class Exemption for the Acquis. & Operation of Rail Lines Under 49 U.S.C. 10901, 4 I.C.C.2d 309 (1988); 49 C.F.R. § 1150.35.

In prior challenges to the use of § 10901 and the two-step process, parties have argued that when the acquisition is of all the rail lines of a carrier, the acquisition should be considered the acquisition of control of a carrier and not just of assets. Parties also have contended that where the parent of the non-carrier itself is a carrier, the parent should be considered as the acquiring entity. However, the ICC, the Board, and the courts have long rejected such claims.[14] Here, there is even less justification to disregard the two-step structure because RCP&E is acquiring only about 25% of a single carrier's track miles; GWI is not itself a rail carrier.

The Unions claim that the two-step process is at odds with Supreme Court precedent issued between 1940 and 1962 limiting the use of subsidiaries by holding companies.[15] But the cases Petitioners cite pre-date the statutory changes reducing the regulation of railroads in the Staggers Rail Act of 1980, and the additional statutory changes Congress made in ICCTA specifically embracing cases such as this one. Moreover, the agency (with judicial approval) has followed a long-established policy that the two-step process can be used if there are legitimate business reasons unrelated to labor protection for an entity to set up a newly created subsidiary to acquire a poorly served line of railroad owned by an existing carrier. See, e.g., Bhd. of Maintenance of Way Employees v. STB (BMWE), 200 Fed. Appx. 1 (D.C. Cir. 2006) (2006 WL 2036680). See also S. Kan. & Okla. R.R.—Acquis. & Operation Exemption—The Atchison, Topeka & Santa Fe Ry.—Pet. to Revoke (South Kansas), FD 31802 (Sub-No. 1) (ICC served Nov. 27, 1992) (rejecting claims based on Gilbertville that were similar to Petitioners' claims here); Wheeling Acquis. Corp.—Acquis. & Operation Exemption—Lines of Norfolk & W. Ry., FD 31591, et al. (ICC served Dec. 14, 1990).

The cases cited by Petitioners such as Marshall Transport and Fox Valley[16] are very different from this case. In Marshall Transport, the parent failed to seek authority to control an

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[14] See e.g., New England Central, slip op. at 24; Signalmen; Iowa, Chicago & E. R.R.—Acquis. & Operation Exemption—Lines of I&M Rail Link (IC&E Stay), FD 34177, slip op. at 10-11 (STB served July 22, 2002); Ga. & Fla. R.R.—Acquis., Lease, & Operation Exemption—Norfolk S. Ry., FD 32680, slip op. 3 (STB served Mar. 18, 1996).

[15] See United States v. Marshall Transport (Marshall Transport), 322 U.S. 21 (1940); County of Marin v. United States (Marin County), 356 U.S. 412 (1958); Allegheny Corp v. Breswick & Co., 353 U.S. 151 (1957); Gilbertville Trucking v. United States, 371 U.S. 115 (1962); Schenley Distillers v. United States, 326 U.S. 432 (1946).

[16] Fox Valley & W. Ltd.—Exemption, Acquis. & Operation—Certain Lines of Green Bay & W. R.R., Fox River Valley R.R., & Ahnapee & W. Ry., 9 I.C.C.2d 209 (1992), aff'd sub nom. Fox Valley & W., Ltd. v. ICC (Fox Valley), 15 F.3d 641 (7th Cir. 1994).

additional carrier. And in Fox Valley, a non-carrier simultaneously acquired what amounted to all of the assets of two separate carriers. The agency has expressly found that "Marshall Transport and Fox Valley do not bring [cases such as this one] within the scope of 49 U.S.C. 11323." I&M Rail Link—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R. D/B/A Canadian Pac. Ry. (I&M/Soo), 2 S.T.B. 167, 175 (1997); aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998).[17]

Finally, IAM fails to support its argument that we should find that "affected employees" under § 11326 include those under the acquisition exemption. The agency has rejected this position. See Econ. Dev. Rail II Corp.—Acquis. Exemption—Lines of Consol. Rail Corp., FD 32798, slip op. at 3 (STB served Apr. 15, 1996); Buffalo & Pittsburgh R.R.—Exemption—Acquis. & Operation Of Lines in N.Y. & Penn. (Buffalo), FD 31116, et al., slip op. at 8 (ICC served July 10, 1989). IAM has not demonstrated that we should depart from the agency's prior interpretation.

In sum, the statute, agency precedent, and court precedent all permit use of the two-step exemption process. RCP&E and GWI properly invoked it here, and the Petitioners neither demonstrate otherwise nor convince us that the precedent should be overturned.

Sham and the Alter Ego Test. As previously noted, precedent holds that RCP&E's exemption could be revoked if the transaction were a sham; in other words, if Petitioners could demonstrate that RCP&E exists not as a stand-alone entity but solely for GWI to evade labor protection as it seeks to acquire and operate the DM&E West Lines. Petitioners maintain that these transactions should be revoked because RCP&E and GWI, along with the GWI family, are one and the same. In addressing these types of claims, the Board employs an alter ego test.[18] Under the alter ego test, the Board has consistently chosen not to disregard the existence of a non-carrier corporate subsidiary like RCP&E, where (a) the subsidiary was created to purchase the line for legitimate and substantial business reasons and not solely to avoid labor protection, and (b) the non-carrier subsidiary is in fact a separate, sufficiently independent company. The new non-carrier need not be totally independent of its parent and affiliates. Rather, it suffices that the new entity be a separate, real company in its own right, responsible for its own accounts.[19]

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[17] See also I&M/Soo, 2 S.T.B. at 175-177. Nor is Marin County comparable. There, the Court concluded that the ICC had no jurisdiction over a transaction purportedly between "carriers," but where in fact one entity was just a corporate shell without property or function and the acquisition was little more than a paper transaction. But cases like Marin County have never been held to apply to situations where there is substantial evidence in the record demonstrating that the acquiring business is a *bona fide* local business, with a business plan for improving service to local shippers. See, e.g., BMWE, slip op. at 2.

[18] See IC&E Revocation, 6 S.T.B. at 503.

[19] IC&E Stay, slip op. at 10-11.

As to the first part of this test, we are satisfied that the RCP&E acquisition was a bona fide transaction. SMART asserts that GWI created RCP&E solely to avoid labor protective conditions because GWI could have purchased the DM&E West Lines on its own. But RCP&E reasonably explains that the corporate structure elected by GWI and RCP&E assures that the existing railroads in the GWI family will be insulated from the financial risks of the new operations of RCP&E, and vice-versa. Insulating corporate affiliates has routinely been accepted and recognized as a legitimate and substantial business reason for creating a subsidiary,[20] and Petitioners fail to demonstrate that we should not follow that precedent here.

The second part of the alter ego test concerns whether RCP&E is sufficiently independent of GWI and its family. The primary focus is on whether the new entrant is financially independent of its parent, and whether the subsidiary operates and is managed independently. To establish its independence, the acquiring non-carrier subsidiary has to assume full responsibility for its operating decisions, profits, debts, and risk of loss.[21] Here, RCP&E has met that test. RCP&E's purchase is an "asset deal," and therefore the assets being acquired (including contracts for the use of the land, locomotives, and equipment) will be held by the new entity itself and not the parent company. The record demonstrates that, post-closing, RCP&E will be responsible for the risks and financial obligations arising from its operations. GWI will not be responsible for the contracts or operating expenses of RCP&E. Further, RCP&E has entered into its own contracts for separate and distinct office space that will not be shared with GWI or its family.[22]

The Unions and IAM question RCP&E's financial independence. They note that, under the guaranty agreement between GWI and DM&E/CP, GWI has guaranteed the full and prompt payment of RCP&E's purchase price. IAM also points to cases where the ICC allegedly found the absence of a financial guarantee by the parent probative of independence.[23] In a number of recent cases, however, the Board found loan guarantees of the type at issue here common and acceptable. For example, in both IC&E Revocation and Mountain Laurel, the Board noted that it is "customary" for parent companies to supply money for start-up expenses and initial capital as well as specific loan guarantees. The agency appreciated that new non-carrier entities may have

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[20] See Mountain Laurel R.R.—Acquis. & Operation Exemption—Consol. Rail Corp. (Mountain Laurel), FD 31974, slip op. at 13-14 (STB served May 15, 1998), recon. partially granted on other grounds (Aug. 7, 1998).

[21] See Mountain Laurel, slip op. at 15, n. 22 and cases cited therein.

[22] See RCP&E Reply 18 (May 7, 2014).

[23] See Chesapeake & Albemarle R.R.—Lease, Acquis., & Operation Exemption—S. Ry., FD 31617, slip op. at 8 (ICC served Sept. 10, 1991). ("There is no record of any financial guarantee of commitments by [the parent] to back up [the subsidiary's] obligations, and it appears that creditors must look solely to [the subsidiary] for satisfaction."); Akron Barberton Cluster Ry.—Acquis. & Operation Exemption—Certain Lines of Consol. Rail Corp. (Akron), FD 32537 et al., slip op. at 5 (ICC served Jan. 12, 1996) (finding probative that subsidiary's "debts are not guaranteed by its parent"); and Buffalo, slip op. at 7 (finding probative that "[t]his acquisition has not been financially guaranteed" by parent corporation.).

difficulty obtaining independent financing and that loan guarantees from corporate affiliates are less costly and more secure than outside financing. See IC&E Revocation, 6 S.T.B. 503-04; Mountain Laurel, slip op. at 14-15.[24] Therefore, start-up assistance, including loan guarantees, does not necessarily jeopardize RCP&E's financial independence where the subsidiary will be responsible for its own financial risk and obligations into the future.

The evidence here demonstrates that RCP&E will operate independently of GWI and the GWI family in the future. RCP&E notes that it has hired its own operating employees and a general manager dedicated to operations on the DM&E West Lines who will not be shared with any other railroad. RCP&E has also hired a local manager of sales and marketing and an assistant vice president of marketing to grow business on the lines.[25] RCP&E will hold itself out to provide rail service in its own name and will have its own reporting marks and tariffs; conversely, RCP&E's parent, GWI, has neither railroad reporting marks nor any authority to operate as a rail carrier. In addition to the approximately 50 locomotives and 652 rail cars that RCP&E will acquire through the assignment of leases from DM&E, RCP&E has made arrangements to purchase an additional 121 rail cars and to lease approximately 2,200 additional rail cars.[26]

IAM raises concerns that DM&E has bound GWI to stand in the shoes of RCP&E to provide specific performance of many on-going obligations between the parties under the Transaction Agreement. According to IAM, these commitments include RCP&E's grant of trackage rights, DM&E/CP's retention of the right to serve coal shippers, and other service arrangements. The Unions similarly assert that the sale would not have been possible without these assurances and that it is readily apparent that this deal would not have been made with a stand-alone, new entity.

The assurances and guarantees that GWI has made do not, standing alone, demonstrate that RCP&E is not sufficiently financially independent. The obligations being guaranteed by GWI will be borne in the first instance by RCP&E, and it will be operating independent of the GWI family. Furthermore, RCP&E's other obligations to third parties in the ordinary course for

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[24] See also Willamette & Pac. R.R.—Lease & Operation Exemption—S. Pac. Transp. Co., FD 32245 et al., slip op. at 9 (ICC served Sept. 7, 1995); South Kansas, slip op. at 5 ("We have consistently held that loan guarantees and equity contributions by a parent company to a subsidiary do not render the subsidiary the alter ego of the parent."); and New England Central., slip op. at 25-26 ("A parent's guarantee of the financial obligation of the subsidiary to the seller is indeed common. It is not evidence of financial dependence if it is shown . . . that the parent is not providing any other financial guarantees."). Although the agency in Akron did note the absence of a guarantee of debts as an indicator of independence, it also stated ". . . the provision by the parent company of start-up capital is not determinative of the issue of whether the newly formed subsidiary is responsible for its own operating profits and losses. . . ." Akron, slip op. at 5.

[25] See RCP&E Reply 18 (May 7, 2014).

[26] See id. 19.

ongoing operating expenses, including those related to customers and rail operations, are not being guaranteed by GWI or any affiliated carriers.

The Unions also point to several officers who hold positions in both RCP&E and GWI as an indication of RCP&E's lack of independence. However, the Board noted in Mountain Laurel, slip op. at 16, that the ICC repeatedly found operational independence even in cases where the acquiring carrier and its affiliates shared officers, directors, and offices. Closely held corporations controlled by one person or a small group of people typically have common officers and directors.[27] Additionally, as RCP&E points out, despite some overlap, it has its own board composed of different directors from GWI, and this board will vote on its own and have meetings separate from GWI.[28]

The Unions further claim that RCP&E is not a separate entity because GWI's subsidiary (Genesee and Wyoming Railroad Services Inc. (GRSI)) will provide certain administrative and corporate services for RCP&E and others in the GWI family. However, the Board has found that it is common for short line operators to contract for administrative and operational services with their parent firms; such transactions do not establish a lack of independence so long as they occur at arm's length. See Mountain Laurel, slip op. at 16. Although RCP&E is larger than a short line, the same principle applies here. Finally, we note that each of the railroads in the GWI family, including RCP&E, is billed by GRSI for its services on an equitable basis.

The Unions also rely on statements by GWI suggesting that its activities are the same as RCP&E's activities, as well as statements to the Securities and Exchange Commission where GWI used "we" when describing RCP&E's activities. But the Board and the ICC have found that the subsidiary can be independent of the parent in situations where the parent makes collective statements in reference to the subsidiary. See New England Central. As noted by RCP&E,[29] general statements such as those made here do not undermine the actual legal structure created by the parties.

In sum, despite some assistance to help the project get off the ground, going-forward RCP&E will be an independent legal company in its own right. It is not the alter ego of GWI or the other railroads in the GWI family, nor is there any evidence that this acquisition was in any sense a sham.[30]

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[27] See I&M/Soo, 2 S.T.B. at 177 n.26.

[28] See also IC&E Stay, slip op. at 11 (sharing of certain management is common and does not detract from independence).

[29] RCP&E Reply 25-26 (May 7, 2014).

[30] Although supporting the line acquisition, two entities ask that the Board essentially "condition" its approval. First, Bentonite and WRRA call upon the Board to provide oversight during the transition of operations from DM&E to RCP&E. We see no need to formally monitor this situation, as the Board is closely monitoring rail service issues in the EP 724, United States Rail Service Issues Dockets, and RCP&E's service is well underway. Second, WRRA seeks confirmation that this transaction will not involve hidden or undisclosed paper barriers. Such

(continued . . .)

This decision will not significantly affect either the quality of the human environment or the conversation of energy resources.

It is ordered:

1. The Petitioners' request for leave to file replies to RCP&E's reply is granted, their May 23, 2014 filings are accepted into the record, and RCP&E's request in opposition thereto is denied.

2. The requests for an oral argument are denied.

3. The petitions for revocation are denied.

4. This decision is effective on the date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

(. . . continued)
confirmation is not necessary, as RCP&E has already complied with 49 C.F.R. § 1150.33(h) (1) by disclosing the existence of a specific interchange commitment.